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No. _____

In The

Supreme Court of the United States

TONY LAM,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent,

STATE OF CALIFORNIA,

Real Party in Interest.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF BARRY O. BERNSTEIN
BARRY O. BERNSTEIN,
CA Bar No. 43230
Counsel of Record
KARYN H. BUCUR,
CA Bar No. 158608
3727 W. Magnolia Blvd. #767
Burbank, California 91510
(818) 558-1717

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether or not a certificate of probable cause should have been issued because the government's outrageous conduct of providing vehicles and encouraging, directing, and facilitating, potentially violent and deadly car crashes to unsuspecting California motorists during police insurance fraud investigations violates the Due Process Clause of the Fifth Amendment of the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI

The petitioner Tony Lam respectfully prays that a writ of certiorari issue to review the California Supreme Court's decision to deny his petition for review.

OPINION BELOW

On November 19, 2003, the California Supreme Court filed an unpublished order in *Tony Lam v. Los Angeles County Superior Court*, Respondent, *The People*, Real Party in interest, S119397 denying petitioner's petition for review. Three justices of the California Supreme Court were of the opinion that the petition should be granted. A copy of that order is attached hereto as Appendix "D".

JURISDICTION

On November 19, 2003, the California Supreme Court entered an order denying petitioner's petition for review. (App. "D".) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), § 1257, or alternatively under 28 U.S.C. § 1651.

STATUTES INVOLVED IN THIS CASE

California Penal Code § 550(a)(1), (a)(5)

Unlawful acts related to claims

(a) It is unlawful to do any of the following, or to aid, abet, solicit, or conspire with any person to do any of the following:

(1) Knowingly present or cause to be presented any false or fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance.

(2) Knowingly present multiple claims for the same loss or injury, including presentation of multiple claims to more than one insurer, with an intent to defraud.

(3) Knowingly cause or participate in a vehicular collision, or any other vehicular accident, for the purpose of presenting any false or fraudulent claim.

(4) Knowingly present a false or fraudulent claim for the payments of a loss for theft, destruction, damage, or conversion of a motor vehicle, a motor vehicle part, or contents of a motor vehicle.

(5) Knowingly prepare, make, or subscribe any writing, with the intent to present or use it, or to allow it to be presented, in support of any false or fraudulent claim.

(6) Knowingly make or cause to be made any false or fraudulent claim for payment of a health care benefit.

(7) Knowingly submit a claim for a health care benefit that was not used by, or on behalf of, the claimant.

(8) Knowingly present multiple claims for payment of the same health care benefit with an intent to defraud.

(9) Knowingly present for payment any undercharges for health care benefits on behalf of a specific claimant unless any known overcharges

for health care benefits for that claimant are presented for reconciliation at that same time.

(10) For purposes of paragraphs (6) to (9), inclusive, a claim or a claim for payment of a health care benefit also means a claim or claim for payment submitted by or on the behalf of a provider of any workers' compensation health benefits under the Labor Code.

California Penal Code § 1237.5

Prerequisites to appeal from conviction on plea of guilty or nolo contendere or revocation of probation following admission of violation.

No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:

(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.

STATEMENT OF THE CASE

The complaint charged petitioner of insurance fraud in violation of Penal Code sections 550 subdivision (a)(1), and 550 subdivision (a)(5) in counts one and three, respectively.

(CT 457.)[1] On June 12, 2001, the superior court conducted a preliminary hearing and held petitioner to answer to these charges.

On July 10, 2001, an Information was filed charging petitioner with the crimes charged in the complaint. On October 16, 2002, petitioner filed a motion to dismiss the Information. The Real Party in Interest, The People of the State of California opposed this motion.

On January 7, 2003, the superior court heard oral argument on the motion. On January 13, 2003, the superior court denied petitioner's motion to dismiss. Petitioner filed a petition for prohibition/mandate in case number B164460. The Court of Appeal, Second Appellate District, Division One, denied the petition on February 6, 2003. The California Supreme Court denied review on March 19, 2003, in case number S113632.

On April 29, 2003, petitioner pled guilty to the charges against him. Petitioner filed a request for a Certificate of Probable Cause for Appeal pursuant to California Penal Code section 1237.5. The request was denied on June 13, 2003. (Appendix C.) On July 14, 2003, petitioner was sentenced to a term of one year in jail. Imposition of that sentence was suspended and petitioner was placed on formal probation. (CT 653.) Petitioner was ordered to enroll in electronic monitoring for one year. (CT 652.) The court stated that the motion for probable cause was prematurely ruled upon on June 13, 2003. The court

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[1] "CT" refers to the Clerk's Transcript filed in the California Court of Appeals, "RT" refers to the Reporter's Transcript, and "PHT" refers to the Preliminary Hearing Transcript.

struck the ruling and then denied the motion for probable cause again. (CT 654.) (Appendix B.)

Petitioner filed a petition for writ of mandate in the Court of Appeals, Second Appellate District, Division One, Case No. B169973. The petition for writ of mandate was denied on September 23, 2003. (Appendix A.) The petitioner filed a petition for review in the California Supreme Court. On November 19, 2003, the petition for review was denied. Three of the justices were of the opinion that the petition should be granted. (Appendix D.)

SUMMARY OF ARGUMENT

Investigators from the State of California, Department of Insurance, "DOI" staged car accidents as an investigative technique in an investigation for insurance fraud. The state supplied the car and the insurance. The government then encouraged, directed, and facilitated a potentially deadly car crash. The three victims of the state-directed car crash were unsuspecting and innocent California motorists. The government agents declined to ride the car for fear of their own safety. As a result of this crash, the state obtained a criminal conviction against petitioner.

Petitioner argues that the government conduct in this case was so outrageous, intolerable, and offensive as to violate due process and warrant dismissal of the Information. The state conduct was outrageous because it was criminal in nature: it provided a deadly weapon that was specifically used to assault private citizens. The state court denied petitioner's request for a certificate of probable cause to seek review of this issue in the appellate

courts cause after he pled guilty. Three justices of the California Supreme Court were of the opinion that review should have been granted.

STATEMENT OF MATERIAL FACTS

The testimony at the preliminary hearing showed the following facts material to this petition:

Investigators from the State of California, Department of Insurance ("DOI") arrested Fred Yue in 1999 for staging car accidents. Yue agreed to cooperate with the DOI in disclosing fraudulent claim activity. (CT, PHT 6, 43.) Yue also assisted the DOI by participating in an undercover operation. (CT, PHT 83-84.) Yue lost contact with the DOI and no case was filed against Yue. (CT, PHT 41, 52.)

During the summer of 2000, defendant Derek Lai, a friend of Yue's asked Yue if he knew anyone who had a good insurance policy to be used in a staged accident. (CT, PHT 9, 10, 44, 45) Yue said that he did not have anyone yet. (CT, PHT 10.)

The DOI rearrested Yue because the DOI could not find him pursuant to his cooperation agreement. (CT, PHT 47.) Yue told DOI case investigator Anthony Alaniz about his earlier conversation with Derek Lai. Yue testified that Investigator Alaniz, "asked [me] if I could get in touch with this guy and try to set up an accident with him . . . " (CT, PHT 10.)

Yue agreed to work with the DOI in an undercover operation in hopes to earn a reduced sentence in his own case. Yue contacted Lai. (CT, PHT 6, 10, 57.)

The DOI provided a pretext insurance policy, a car, and an undercover officer, Albert Wong, posing as Randy Lee. Investigators asked Yue to introduce Lee to Derek Lai. Yue met with Lai and showed him Randy Lee's Farmer's Insurance Policy. Investigator Alaniz provided this insurance policy to Yue. Lai told Yue he was interested in staging a collision utilizing the policy. (CT, PHT 15.)

Randy Lee was supposed to be the driver of the car and the party not at fault. (CT, PHT 19.) However, the DOI would not let Randy Lee drive the car. Randy Lee was afraid even to be a passenger – and decided not to be in the car during the staged accident. (CT, PHT 20.)

On February 22, 2001, DOI Investigator Albert Wong, acting undercover as Randy Lee met with defendant Peter Lau at a time and location provided by Yue. Lee took a photocopy of the vehicle registration, the insurance information, and his social security card to the meeting. Lee understood that Lau would take the car and return it later. (CT, PHT 233, 234-238.)

Lau left with the car. Lau returned the car that evening. (CT, PHT 240.) Lee noticed that there was damage to the right front fender area and quarter panel of the vehicle. (CT, PHT 240.) Defendants Tony Chan and Michael Choi got out of the car, as well as two females. Chan nodded his head when Lee asked him if it was a "good hit". (CT, PHT 243, 244.) The actual collision occurred on Valley Boulevard. (CT, PHT 331.) There were three innocent victims in the car: a man, his daughter, and his father.

Chan told Lee that he was being represented by the Law Offices of Bill Him. Lau and Chan told Lee that he needed to report the collision to the insurance company. (CT, PHT 247-250.)

On March 23, 2001, Lau told Lee that he only needed to visit the doctor one time. On June 16, 2001, Lee went to the office of petitioner, Dr. Tony Lam in Hacienda Heights. Lee filled out some paperwork and signed several sign-in sheets. (CT, PHT 261.) Lee signed his name over forty times for various dates. (CT, PHT 262.) Lee never received any treatment from petitioner. (CT, PHT 266.)

Nicholas Legaspi, a California Highway Patrol officer, worked in an insurance fraud task force with the DOI. During the course of the investigation Legaspi reviewed over thirty insurance claims which involved persons he suspected were connected with defendant Peter Lau and others. Legaspi concluded that there was no evidence of great deal of bodily injury to any of the participants. (CT, PHT 389.) Legaspi also said that the fraud investigation team in this case was "teletracking" the car during the undercover police investigation. (CT, PHT 336.)

State insurance investigators said that "the car was provided by the state . . . and in effect the state got the car into the scene . . . there was concern for the officer safety and in fact the car was crashed." (CT, PHT 168.)

REASON FOR GRANTING THE WRIT

REVIEW SHOULD BE GRANTED IN THIS CASE BECAUSE THE GOVERNMENT'S OUTRAGEOUS CONDUCT OF PROVIDING VEHICLES AND ENCOURAGING, DIRECTING, AND FACILITATING POTENTIALLY VIOLENT AND DEADLY CAR CRASHES TO UNSUSPECTING CALIFORNIA MOTORISTS DURING POLICE INSURANCE FRAUD INVESTIGATIONS VIOLATES THE DUE PROCESS CLAUSE.

ARGUMENT

A CERTIFICATE OF PROBABLE CAUSE SHOULD HAVE BEEN ISSUED BECAUSE THE GOVERNMENT'S OUTRAGEOUS CONDUCT OF PROVIDING VEHICLES AND ENCOURAGING, DIRECTING, AND FACILITATING POTENTIALLY VIOLENT AND DEADLY CRASHES TO UNSUSPECTING CALIFORNIA MOTORISTS DURING POLICE INVESTIGATIONS VIOLATES THE DUE PROCESS CLAUSE

In reviewing a court's refusal to issue a certificate of probable cause, the applicable standard is whether the appeal is clearly frivolous and vexatious **or** whether it involves an honest difference of opinion, not whether there was probable grounds for reversal of the judgment. *People v. Ribero*, 4 Cal. 3d 55, 63 n. 4, 92 Cal. Rptr. 692 (1941) In other words, petitioner does not have to demonstrate that he will prevail on appeal in order to have a certificate of probable cause issued, just that his issue on appeal is not frivolous and involves an honest difference of opinion.

This year this Court issued instructions on how a court should consider a request for a Certificate of Appealability. *Miller-El v. Crockrell*, 537 U.S. 322, 123 S. Ct.

1029, 154 L. Ed. 931, 1039-1040 (2003). A Certificate of Appealability is similar to a Certificate of Probable Cause. The Court made clear that a Certificate of Appealability does not require a showing that the appeal will succeed. *Miller-El v. Crockrell, supra,* 123 S. Ct. at 1039. "A prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Id.* at 1040.

"Appeals from the superior court following a guilty plea are limited to those that raise *reasonable constitutional*, jurisdictional, or other grounds going to the legality of the proceedings and require a defendant to obtain a certificate of probable cause." (Emphasis added.) *People v. Egbert*, 59 Cal. App. 4th 503, 508, 68 Cal. Rptr. 2d 913 (1997).

In this case, petitioner argues that his conviction is unconstitutional due to outrageous government conduct. Based on the argument below, petitioner argues that reasonable jurists could have an honest difference of opinion of whether or not petitioner's conviction is unconstitutional. Accordingly, petitioner respectfully requests that this Court order the superior court to issue a certificate of probable cause so that he may pursue his appeal.

The claim of outrageous government conduct rests on the Due Process Clause of the Fifth Amendment. *United States v. Russell*, 411 U.S. 423, 431-432, 93 S. Ct. 1637, 36 L. Ed. 366 (1973) (mentioning outrageous government conduct as a viable claim); *Hampton v. United States*, 425 U.S. 484, 490, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976) (determining that the limitations of the Due Process

Clause of the Fifth Amendment are implicated when government conduct violates a protected right.)

In this case, the government provided the vehicle and insurance policy to an informant during an insurance fraud investigation. The government encouraged and facilitated a very dangerous staged-accident targeted at innocent and unsuspecting California motorists as part of their investigation technique.

In other words, the governmental action challenged by the petitioner is "outrageous" within the meaning of the Due Process Clause for the following reasons:

(1) the government, through the Department of Insurance, "DOI" supplied a car, a deadly weapon, to be used in an undercover investigation for insurance fraud;

(2) the government supplied the insurance for the car;

(3) the government encouraged, directed, and facilitated the potential deadly car crash;

(4) the three victims of the state-directed car crash were unsuspecting and innocent California motorists;

(5) the government agents declined to ride in the car for fear of their own safety;

As will be shown, this is "outrageous" government conduct of the worst sort, and merits dismissal of the Information against the petitioner.

a. A Conviction Cannot Stand Where "Outrageous" Conduct By the Government Is Found

The claim that petitioner raises in this writ is similar to, but is not defined by, the same rules as for a defense of entrapment. For entrapment presents a question of fact, while outrageous governmental conduct presents a question of law. *United States v. Abushi*, 682 F.2d 1289, 1302 (9th Cir. 1982).

Moreover, entrapment focuses on the predisposition of the defendant to commit the crime. *Sorrells v. United States*, 287 U.S. 435, 442, 53 S. Ct. 210, 77 L. Ed. 413 (1932). By contrast, "[o]utrageous government conduct refers to **behavior of investigators**. This conduct is considered without reference to any predisposition on a defendant's part. (Citation omitted.)" (Emphasis added.) *United States v. Garza-Juarez*, 992 F.2d 896, 903-904 (9th Cir. 1993).

The inquiry instead "focuses upon the **method** used to 'make' the case. . . . " (Emphasis added.) *United States v. McClure*, 546 F.2d 670, 673 (5th Cir. 1977). The government's conduct must be "repugnant to the American system of justice." *Shaw v. Winters*, 796 F.2d 1124, 1125 (9th Cir. 1986), quoting *United States v. Lomas*, 706 F.2d 886, 891 (9th Cir. 1983).

Where the behavior of investigators is found "outrageous" as a matter of law, that conduct "may warrant a dismissal of the indictment if the conduct was so excessive, flagrant, scandalous, intolerable and offensive as to violate due process. . . . " *United States v. Garza-Juarez*, *supra*, 992 F.2d at 903-904.

Petitioner argues that the state action in this case was outrageous as a matter of law because it was equivalent to criminal conduct. Intentionally hitting motorists with a car is illegal and violators are charged with assault with a deadly weapon. Under California law, a motor vehicle is a deadly weapon. *In re Grayden N.*, 55 Cal. App. 4th 598, 604, 64 Cal. Rptr. 2d 277 (1997). If the state was a natural person, it would have been charged with aiding and abetting another who commits an assault with a deadly weapon. *People v. Darryl Shirley*, 18 Cal. App. 4th 40, 45, 22 Cal. Rptr. 2d 340 (1993).

The government's conduct also showed a wanton, reckless disregard for human life. The state's conduct is also identical to an attorney's office who staged accidents and who were ultimately charged with murder and insurance fraud: "Here Shamis's [legal assistant] co-conspirators staged an accident between a passenger car and a big-rig truck for the base, anti-social purpose of defrauding and stealing large amounts of money from insurers. The staging of the June 17, 1992, accident involved intentionally placing three passengers and a driver in a passenger car, driving the car onto the Interstate 5 freeway, driving the car immediately in front of a fully loaded big-rig truck, then slamming on the car's brakes to cause the truck to collide with the car. **If this conduct does not show a wanton, reckless disregard for human life, we would be hard pressed to find conduct which would.**" *People v. Superior Court [Elena Shamis]*, 58 Cal. App. 4th 833, 844-845, 68 Cal. Rptr. 2d 388 (1997).

Thus, in this argument petitioner demonstrates that the government's conduct in this case warrants a dismissal of the Information as the Government's conduct in providing, directing, and facilitating a dangerous car crash

during a police investigation – directed at – innocent and unsuspecting motorists clearly was behavior so "excessive, flagrant, scandalous, intolerable and offensive as to violate due process." Especially since the goal of the criminal investigation was to obtain a criminal conviction.

b. The Government's Actions In This Case Amounted to Outrageous Conduct in Violation of the Petitioner's Fifth Amendment, Due Process Rights

The Government's conduct in this case was so outrageous that due process principles should bar the Government from invoking judicial processes to obtain any convictions. *United States v. Russell*, *supra*, 411 U.S. at 431-432. Outrageous government conduct which is violative of fundamental fairness and shocking to the universal sense of justice violates the Due Process Clause of the Fifth Amendment. *Id.*, at 432; see also, *United States v. Ramirez*, 710 F.2d 535, 539 (9th Cir. 1983).

Outrageous governmental conduct is a claim that "the government's conduct was so outrageous that due process principles require dismissal of the indictment." *United States v. Slaughter*, 891 F.2d 691, 695 (9th Cir. 1995). The indictment is dismissed even as to defendants who are predisposed to commit the crime and therefore could not claim entrapment. *United States v. Twigg*, 588 F.2d 373, 376 (3rd Cir. 1978).

Petitioner asserts that the government engaged in outrageous conduct by providing a car, which is a deadly weapon, and facilitated car crashes targeted at innocent victims. In fact, in this case, the state targeted a deadly crash in a car that had three people: a man, his daughter,

and his father. By providing the car and insurance, the government manufactured the crime which would not have occurred without the government's direct participation. The focus or final measure of whether the government's conduct is outrageous is on the *quality* of the police conduct. (Emphasis added.) *People v. Wesley*, 224 Cal. App. 3d 1130, 1144, 274 Cal. Rptr. 326 (1990). This conduct of crashing cars into innocent victims is repugnant to a sense of justice. Furthermore, this state-directed investigative technique cannot be condoned in this case, if so, the state will have a green light to continue staging car crashes in investigating fraud rings. Furthermore, as argued in the previous section, the state conduct was criminal in nature and showed a reckless disregard for human life.

In *United States v. Russell*, this Court reversed a decision of the Ninth Circuit, and held that the defense of entrapment requires a lack of predisposition on the part of the defendant. The decision of the Ninth Circuit also relied on the ground that police conduct in that case was so repugnant that due process barred prosecution. Although the *Russell* Court rejected the Ninth Circuit's finding of due process violation, it stated:

> "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed." *United States v. Russell*, *supra*, 411 U.S. at 431.

But this case at bar **is** of that breed. The facts here are really outrageous. The fact that government agents provided the car, insurance, and staged dangerous car

accidents is outside the normal understanding of the duties of a government agent.

In addition, the outrageous conduct in this case is "unique". The federal court has recognized "unique" facts can establish outrageous government conduct. *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971). There, the court focused on the conduct of the government and concluded that "the facts presented by this unique record do reveal circumstances which, in combination, require reversal of these convictions." *Id.*, at 786. The court condemned the agent's conduct in becoming "enmeshed" in criminal activity, and concluded that for the government to then prosecute the defendants for similar behavior was a violation of due process. *Id.*, at 787.

Unique facts regarding outrageous government conduct also warranted reversal in *United States v. Twigg*, *supra*, 588 F.2d at 379 ("Fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was outrageous.") There the reviewing court found the agents' conduct (in creating a new crime just to prosecute the defendants), "reached a demonstrable level of outrageousness." *Id.*

In *Twigg*, the Government had set up a complete drug laboratory, including the necessary equipment, the raw materials and the production site. They even thought up a cover name for the venture: "Chem Kleen". The federal court reversed the convictions, concluding that "Fundamental fairness does not permit us to countenance such actions by law enforcement officials and prosecution for a crime so fomented by them will be barred." *Id.*, at 375-381.

The animating principle underlying *Greene* and *Twigg* is that the Government may not prosecute a *collaborator*

in an criminal enterprise which the Government not only created and maintained, but which it also directly guided. The evil identified by the courts is the Government's actions in generating new crime "merely for the sake of pressing criminal charges against a defendant." *United States v. Ramirez*, *supra*, 710 F.2d at 540; accord, *United States v. Bogart*, 783 F.2d 1428, 1436 (9th Cir. 1986), quoting Justice Brandeis's eloquent dissent in *Olmstead v. United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 72 L. Ed. 944 (1928):

> "Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law unscrupulously. Our government is the potent, the omnipresent teacher. **For good or for ill, it teaches the whole by example**. Crime is contagious. **If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy**. To declare that in the administration of the criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." (Emphasis added.)

By providing the car and insurance, the government allowed potentially violent and deadly activities to happen. The government lucked out that no one was seriously injured in this case – however -- what if someone was seriously injured? What would the government tell the injured person's family member or friend? There is only

one answer the government could give to a grieving person: "We staged this car crash in order to arrest someone and obtain a conviction for insurance fraud." This conduct is outrageous and should not be tolerated or sanctioned by the court. The government must not be allowed to obtain criminal convictions by crashing cars into innocent people.

The government's outrageous conduct alone also shocks the conscience. What also is shocking is that no one in the government considered the fact that this deadly method of police investigation was deadly, unusual, bizarre, and atypical and could hurt innocent people. But, we do know that the state thought that this method of investigation was too dangerous for its own employees to participate in – and the agent deliberately did not ride in the car in fear of his own safety. (CT, PHT 20.)

Thus, this prosecution is analogous to those in which the "conscience is shocked," such as, for example, where police officers broke into a defendant's bedroom, then attempted to pull drug capsules from his throat, and finally forcibly pumped his stomach to retrieve the capsules. *Rochin v. California*, 342 U.S. 165, 166, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952) The conscience also is shocked when border patrol officers forcibly removed narcotics packets from a defendant's rectum while he was handcuffed and held spread-eagled across the table by other officers. *Huguez v. United States*, 406 F.2d 366, 381 (9th Cir. 1968).

The federal court has not accepted the view that this highly discrete group of extreme cases of police brutality (*Huguez* and *Rochin*) defines the limits of unconstitutionally outrageous Government conduct. The Court instead

has accepted a broader definition of unconstitutional outrageous conduct which includes cases where Government agents engineer and direct the criminal enterprise from start to finish, or when police generate new crimes for the sake of pressing criminal charges. *United States v. Bogart*, *supra*, 783 F.2d at 1436.

But this begs the question, what conduct "legally" shocks the conscience? The federal court examined this issue in *United States v. Simpson*, 813 F.2d 1473, 1465-1466 (9th Cir. 1987); there a Government informant had sexual intercourse with the defendant on a regular basis, and used their sexual relationship to deceive him into believing she was an intimate friend, so she could lure him into selling heroin to undercover agents.

By comparing these facts to conduct that legally shocked the conscience (such as the pumping of a stomach and the forcible removal of drugs from a rectum), the court in *Simpson* rejected the defendant's claim of outrageous government conduct and observed that "the requisite level of outrageousness" is not established merely upon a showing of obnoxious behavior, or even flagrant misconduct by the police; "due process is not transgressed absent coercion, violence or brutality to the person." *United States v. Simpson*, *supra*, 813 F.2d at 1466.

Comparing the cases described above, it is abundantly clear that government's conduct in this case was so outrageous that it falls into the category of conduct which violates the Due Process Clause.

In the case at bar, the government's violent activity meets the legal level of outrageousness – indeed, they surpass it. For the State of California to provide a vehicle for the sole purpose of crashing the car into unsuspecting

California motorists is at least as "outrageous," if not more so, than pumping one suspect's stomach or forcibly pulling drugs out of another's rectum.

Providing the vehicle and insurance and encouraging, directing, and facilitating car crashes into innocent people is also more outrageous than the Government's conduct in providing the location, equipment, and all necessary chemicals for a "speed" laboratory *Twigg*, *supra*, 588 F.2d at 375-381, and is more outrageous than re-establishing and sustaining a bootlegging operation that had been shut down as a result of prior convictions, which the Government did in *Greene*, *supra*, 454 F.2d at 787.

Both the convictions were reversed in *Greene* and *Twigg* based on findings of outrageous governmental conduct. Similarly, a certificate of probable cause should have been granted in this case so that petitioner may pursue this important constitutional issue on appeal.

The petitioner acknowledges that the government sometimes may have to involve themselves in criminal activity during undercover investigations. There are, however, "constitutional limits on the type and extent of criminal activity, germane to the investigation or not, in which the government can become involved: It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. **Governmental 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction.**" (Emphasis added.) *United States v. Simpson*, *supra*, 813 F.2d at 1470.

A "[p]rosecution is barred [for violation of due process] only when the government's conduct is so shocking and so outrageous as to violate the universal sense of justice." *United States v. Ramirez, supra,* 710 F.2d at 539, quoting *United States v. Ryan,* 548 F.2d 782, 789. (9th Cir. 1976). The petitioner contends a "universal sense of justice" must be shocked and outraged by what happened here; and the only way to stop police and prosecutors from entering into this kind of outrageous conduct is to negate any reward they may achieve by doing so. That is, to refuse to allow the Government the ability to enjoy convictions based on this kind of investigative teamwork. *Furthermore, the government should not be able to enjoy convictions based on its own criminal conduct. As discussed previously, if the state were a natural person, it would have been charged with aiding and abetting an assault with a deadly weapon.*

Ultimately, each case in which dismissal is sought for outrageous conduct must be resolved on its own particular facts. *United States v. Bogart, supra,* 783 F.2d at 1438. In this case, the California Court denied petitioner's request for a certificate for probable cause. (CT 654.) Petitioner argues that it should have been issued because reasonable jurists could have an honest difference of opinion of whether or not government's conduct in this case was so outrageous to warrant a dismissal of the conviction. The record fully reflects that state representative, Investigator Alaniz asked Yue if he could get in touch with someone and try to set up an accident with him. (CT, PHT 10.) At that point in time, there was no evidence of any "on-going" criminal activity. The state clearly instigated, directed, and facilitated this crime.

The fact that no one experienced "a great deal of bodily injury" in the other accidents does not make the

state's conduct less outrageous. There were three people in that car. The state was lucky that no one was hurt in this accident. It's interesting that the state felt that it was too dangerous to allow one of its agents to be the car, but was not concerned of the safety of unsuspecting motorists. The focus of the inquiry of whether or not the government's conduct was outrageous enough to warrant dismissal of the information *centers around the conduct* of the police, not the fact that they believed no one would get hurt. *People v. Wesley, supra*, 224 Cal. App. 3d at 1144.

It appears that courts sometimes are frustrated when trying to draw lines between permissible and impermissible forms of undercover activity: "What we hold is that, recognized as is the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough – it is just too much." *United States v. Archer* (2nd Cir. 1973) 486 F.2d 670, 677.

Drawing the line in this case, however, is an easy task. The government's outrageous conduct was "more than enough – it is just too much." *Id.* The government's conduct of crashing cars into innocent people exceeds the constitutional limits of appropriate investigative methods. A certificate of probable cause should have been issued because the government's outrageous behavior violated petitioner's Fifth Amendment Due Process rights.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that the petition for writ of certiorari should be granted.

Dated: January 23, 2004

Respectfully submitted,

LAW OFFICES OF BARRY BERNSTEIN

BARRY O. BERNSTEIN
Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION ONE

TONY LAM, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent. THE PEOPLE, Real Party in Interest	B169973 (L.A.S.C. No. BA223673) ORDER (Filed Sep. 23, 2003)

THE COURT*:

The petition for writ of mandate, filed September 16, 2003, has been read and considered.

The petition is denied.

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*SPENCER, P.J. ORTEGA, J. MALLANO, J.

APPENDIX B

MINUTE ORDER

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE PRINTED: 07/14/03

CASE NO. BA223673

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

DEFENDANT 04: TONY MOTUNG LAM

INFORMATION FILED ON 09/19/02.

COUNT 01: 550(A)(1) PC FEL – PRESENT FALSE/FRAUD CLAIM PAYM.
COUNT 03: 550(A)(5) PC FEL – INSURANCE-WRITTEN FALSE CLAIM.

ON 07/14/03 AT 830 AM IN LASC – CENTRAL DEPT 102

CASE CALLED FOR PROBATION AND SENTENCE HEARING

PARTIES: TRICIA ANN BIGELOW (JUDGE)
RACHAEL ANDINO (CLERK)
MARY LU MURPHY (REP)
ERIC NEAL LAVINE (DA)

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY B.O. BERNSTEIN PRIVATE COUNSEL

AS TO COUNT (01), (03):

IMPOSITION OF SENTENCE SUSPENDED

DEFENDANT PLACED ON FORMAL PROBATION

FOR A PERIOD OF 005 YEARS UNDER THE FOLLOWING TERMS AND CONDITIONS:

IN ADDITION:

–DEFENDANT IS TO MAKE RESTITUTION TO THE VICTIM PURSUANT TO PENAL CODE SECTION 1202.4(F), IN THE AMOUNT OF THREE THOUSAND THREE HUNDRED DOLLARS.

–THE DEFENDANT IS TO PAY A RESTITUTION FINE PURSUANT TO SECTION 1202.4(B) PENAL CODE IN THE AMOUNT OF $200.00 PLUS A $20.00 SERVICE CHARGE.

–SEEK AND MAINTAIN TRAINING, SCHOOLING OR EMPLOYMENT AS APPROVED BY THE PROBATION OFFICER.

–NOT DRIVE A MOTOR VEHICLE UNLESS LAWFULLY LICENSED AND INSURED.

–SUBMIT PERSON AND PROPERTY TO SEARCH OR SEIZURE AT ANY TIME OF THE DAY OR NIGHT BY ANY LAW ENFORCEMENT OFFICER OR BY PROBATION OFFICER WITH OR WITHOUT A WARRANT.

–OBEY ALL LAWS AND ORDERS OF THE COURT.

–OBEY ALL RULES AND REGULATIONS OF THE PROBATION DEPARTMENT.

–DEFENDANT TO REPORT FORTHWITH TO THE ASCOT PROBATION OFFICE LOCATED IN THIS BUILDING – ROOM 3-516.

–DEFENDANT ACKNOWLEDGES TO THE COURT THAT THE DEFENDANT UNDERSTANDS AND ACCEPTS ALL THE PROBATION CONDITIONS, AND DEFENDANT AGREES TO ABIDE BY SAME.

COURT ORDERS AND FINDINGS:

–THE COURT ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.

–PROOF OF ENROLLMENT IN ELECTRONIC MONITORING SERVE 1 YEAR IN THE LOS ANGELES COUNTY JAIL. DEFENDANT TO COMPLETE 365 DAYS OF ELECTRONIC MONITORING IN LIEU OF 365 DAYS IN THE COUNTY JAIL.

DEFENDANT IS GIVEN 5 DAYS CREDIT TOWARD THE ELECTRONIC MONITORING AS 5 DAYS OF ELECTRONIC MONITORING HAS BEEN COMPLETED. DEFENDANT'S OUTSTANDING MONITORING OBLIGATION IS 360 DAYS.

PROOF OF ENROLLMENT IS SET FOR 7-16-03 AT 8:30 A.M. IF THE COURT RECEIVES PROOF OF ENROLLMENT FROM SENTINEL MONITORING PRIOR TO THE NEXT COURT DATE, THE MATTER WILL BE PLACED OFF CALENDAR.

THE COURT STATES THE DEFENDANT'S MOTION FOR PROBABLE CAUSE WAS PREMATURELY RULED UPON ON 6-13-03. THE COURT ORDERS THE RULING MADE ON 6-13-03 STRICKEN. SUBSEQUENTLY, THE

DEFENDANT'S MOTION FOR PROBABLE CAUSE IS DENIED.

COUNT (01): DISPOSITION: CONVICTED

COUNT (03): DISPOSITION: CONVICTED

DMV ABSTRACT NOT REQUIRED

NEXT SCHEDULED EVENT:

07/16/03 830 AM PROOF OF ENROLLMENT DIST LASC – CENTRAL DEPT 102

CUSTODY STATUS: BAIL EXONERATED

CUSTODY STATUS: ON PROBATION

APPENDIX C

MINUTE ORDER

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE PRINTED: 06/13/03

CASE NO. BA223673

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

DEFENDANT 04: TONY MOTUNG LAM

INFORMATION FILED ON 09/19/02.

COUNT 01: 550(A)(1) PC FEL – PRESENT FALSE/FRAUD CLAIM PAYM.
COUNT 03: 550(A)(5) PC FEL – INSURANCE-WRITTEN FALSE CLAIM.

ON 06/13/03 AT 300 PM IN LASC – CENTRAL DEPT 102

CASE CALLED FOR FURTHER PROCEEDINGS

PARTIES: TRICIA ANN BIGELOW (JUDGE)
RACHAEL ANDINO (CLERK)
NONE (REP) NONE (DDA)

DEFENDANT IS NOT PRESENT IN COURT, AND NOT REPRESENTED BY COUNSEL

THE COURT HAS READ AND CONSIDERED DEFENDANT'S REQUEST FOR A CERTIFICATE OF PROBABLE CAUSE, MADE PURSUANT TO PENAL CODE SECTION 1237.5. "APPEALS AFTER PLEAS OF GUILTY

MAY ONLY BE BASED ON 'REASONABLE, CONSTITUTIONAL, JURISDICTIONAL, OR OTHER GROUNDS GOING TO THE LEGALITY OF THE PROCEEDINGS' RESULTING IN THE PLEA." (PEOPLE V. HALSTEAD (1985) 175 CAL.APP.3D 772, 777.)

ISSUES WHICH MAY BE CONSIDERED ON AN APPEAL FROM A JUDGMENT ENTERED AFTER A GUILTY OR NO CONTEST PLEA INCLUDE: INSANITY AT THE TIME OF THE PLEA; INEFFECTIVE WAIVER OF CONSTITUTIONAL RIGHTS, INEFFECTIVE ASSISTANCE OF COUNSEL, OR A PLEA OBTAINED BY MISREPRESENTATIONS. (PEOPLE V. HAYTON (1979) 95 CAL.APP.3D 413, 417.) ISSUES THAT ARE NOT APPEALABLE INCLUDE: SUFFICIENCY OF THE EVIDENCE, FAIRNESS OF A PRETRIAL LINEUP, DISCLOSURE OF THE IDENTITY OF THE INFORMANT, AND SPEEDY TRIAL ISSUES. (ID.)

DEFENDANT SEEKS A CERTIFICATE OF PROBABLE CAUSE TO RAISE THE ISSUE OF WHETHER THE GOVERNMENT'S ACTIONS IN THIS CASE CONSTITUTED "OUTRAGEOUS GOVERNMENTAL CONDUCT." OUR SUPREME COURT HAS HELD THAT "[S]UFFICIENTLY GROSS POLICE MISCONDUCT COULD CONCEIVABLY LEAD TO A FINDING THAT CONVICTION OF THE ACCUSED WOULD VIOLATE HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW."

(PEOPLE V. MCINTYRE (1979) 23 CAL.30 742, 748, FN. 1.) THE ESSENCE OF DEFENDANT'S CLAIM IS THAT THE GOVERNMENT AGENTS ACTIONS WERE OUTRAGEOUS AND SHOCKING TO A SENSE OF JUSTICE. SUCH AN ISSUE DOES NOT GO TO THE LEGALITY

OR JURISDICTION OF THE PROCEEDINGS. ACCORDINGLY, THE CERTIFICATE OF PROBABLE CAUSE IS DENIED.

A COPY OF THIS MINUTE ORDER IS SENT VIA U.S. MAIL THIS DATE TO BARRY O. BERNSTEIN, ESQ., AT 3727 W. MAGNOLIA STREET, BOX #767, BURBANK, CA 91510

NEXT SCHEDULED EVENT:

PROBATION AND SENTENCE HEARING

CUSTODY STATUS: BAIL TO STAND.

APPENDIX D

Court of Appeal, Second Appellate District, Division One – No. B169973
S119397

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Nov. 19, 2003)

TONY LAM, Petitioner,

v.

LOS ANGELES COUNTY SUPERIOR COURT, Respondent,

THE PEOPLE, Real Party in Interest.

Petition for review DENIED.
Kennard, J., is of the opinion the petition should be granted.
Werdegar, J., is of the opinion the petition should be granted.
Moreno, J., is of the opinion the petition should be granted.

GEORGE
Chief Justice